City of New Orleans), Section 29-10 is not repugnant to the Constitution of the United States of America, either as it is written or as it has been construed and applied in this case.

b. Nowhere in its pleadings in the Louisiana courts was it asserted by petitioner that the ordinance involved is unconstitutional as written or as applied. The assertion by petitioner in Article XI of it's answer (page 27 of the petition for writ of certiorari in this matter) that the issuance of an injunction would deny it equal protection and due process under the United States Constitution did not put at issue the constitutionality of this Ordinance on its face or as applied.

c. The Louisiana courts did not, **and were not asked by the petitioner to,** pass upon either a federal question of substance not heretofore determined by this court or a federal question of substance not in accord with applicable decisions of this court.

THE ORDINANCE INVOLVED

The ordinance involved, No. 828 M.C.S., (The Code of the City of New Orleans), Section 29-10, is correct as presented by petitioner.

QUESTIONS PRESENTED FOR REVIEW

One question only is raised in this matter and that is one of fact, namely:

Can the petitioner operate a plant which emits a rancid, acrid odor which is obnoxious, nauseous and a nuisance, as found by the district court and affirmed by the Louisiana Court of Appeals for the Fourth Circuit, and, as to which a writ of certiorari was denied by the Supreme Court of Louisiana.

STATEMENT OF THE CASE

An injunctive proceeding was instituted by the City of New Orleans and the Health Department on the 20th day of November, 1963 for the purpose of seeking relief in order to abate a nuisance which was created by the operation of a "sour-mash dehydrating plant," owned and operated by the defendant-appellant herein, Degelos Bros. Grain Corporation.

The essence of the nuisance sought to be abated consisted of obnoxious, vile, unbearably stinking, irritating, rancid, acrid, nauseous odors emitted into the atmosphere in an area of more than a nine city block radius in a residential neighborhood.

On May 28, 1964 the District Court granted, after an extensive hearing, a preliminary injunction in favor of the City of New Orleans and the Health Department prohibiting and enjoining defendant-appellant "from using its dehydrating plant in any manner which will create or cause to be created, rancid, acrid odors which are obnoxious and nauseous to the citizens of New Orleans."

Defendant-appellants on June 9, 1964 were granted a suspensive appeal and thereupon sought relief from the Court of Appeal, Fourth Circuit, Parish of Orleans.

On May 3, 1965 the Court of Appeal, Fourth Circuit, State of Louisiana, concluded that the only serious issues involved were issues of fact and found no manifest error in the judgment of the Civil District Court. Decision affirmed.

Defendant-appellants on September 30, 1965 applied to the Supreme Court of Louisiana for Certiorari, or writ of Review, to the Court of Appeal, Fourth Circuit, Parish of Orleans. Writ refused. No error of law under the facts found by the Court of Appeal.

ARGUMENT IN OPPOSITION TO THE GRANTING OF THE WRIT

Municipal Ordinance 828 M.C.S., Section 29-10, is valid for the purpose intended.

The state has undoubted power to protect the health of its people and to impose restrictions having reasonable relation to that end.

Northwestern Laundry v. City of Des Moines, 239 U.S. 486, 36 S. Ct. 206, 60 L. Ed. 396;
Miller, et al. v. Schoene, 276 U.S. 272, 48 S. Ct. 246, 72 L. Ed. 568.

PLEADINGS AS ASSERTED BY PETITIONER IN THE LOUISIANA COURTS ARE DEVOID OF ANY PLEAS OF UNCONSTITUTIONALITY OF THE ORDINANCE IN QUESTION EITHER AS WRITTEN OR APPLIED.

An attempt is feebly made by petitioner to infer unfair application of the Ordinance (page 25, para. IV, of petitioner's petition for certiorari to this court). In fact, a reading of the allegations in the paragraph IV above referred to discloses that petitioner had no evidence to show that similar equipment, in a similar plant, was emitting nauseous odors, its only allegation being that on information and belief, its plant and the other plant had similar equipment, but no allegation that this other plant was emitting nauseous odors.

Petitioner alleges that application of the ordinance in question could deprive the petitioner of its rights to equal protection and due process under the United States Constitution. The City of New Orleans and Health Department did not seek to close the plant and the injunction issued does not do so. It simply enjoins the petitioner

from emitting rancid and acrid odors, which are obnoxious, nauseous and a nuisance in the present operation of the plant. The duty to avoid the recurrance and continuance of this odor devolves upon the petitioner to adjust and arrange the operation of its enterprise.

That great financial loss might occur (as a result of injunctive power) is indeed unfortunate but the law is replete with cases where, because of being judicially condemned as a nuisance, a business was forced to find a new location or be entirely abandoned.

This Court has more than once recognized it is a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state. * * *

Hannibal & St. J.R. Co. v. Husen, 95 U.S. 465, 471, 24 L. Ed. 527, 530;

Missouri K & T.R. Co. v. Haber, 169 U.S. 613, 628, 629, 42 L. Ed. 878-883, 18 Sup. Ct. Rep. 488.

The petition further states, at page 3, that the ordinance proscribes odors which are liable to injure health and that the record shows that no health hazard is involved. This is not correct. The finding of fact of the District Court at page 36, is that "The Degelos plant emits a rancid, acrid, penetrating odor which is obnoxious, nauseous and is a nuisance." This finding of fact was affirmed by the Louisiana Court of Appeal for the Fourth Circuit. Writs were denied by the Louisiana Supreme Court.

CONCLUSION

The primary argument made in opposition to the petition for a writ of certiorari to this court is that no substan-

tial federal question, not in accord with applicable decisions of this court, was raised in the lower court.

The only issue in this matter is the question of whether the odors emanating from this plant were rancid and acrid and are obnoxious, nauseous and a nuisance. All of the Louisiana Courts, (the District Court and the Court of Appeal), found the plant emitted such odors. No substantial federal question was raised by the petitioner. The Louisiana courts did not decide any substantial federal question. The lower courts decided one question of fact and that is "the Degelos plant emits a rancid, acrid odor which is obnoxious, nauseous and a nuisance."

Respectfully submitted,

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CERTIFICATE

I, Alvin J. Liska, City Attorney for the City of New Orleans and a member of the Supreme Court of the United States, do hereby certify that on this date, I served copies hereof, on the petitioner in this cause, by mailing a copy in a duly addressed envelope, with postage paid, to Mr. Murray F. Cleveland, counsel of record for said petitioner.

This _____ day of _____, 1966.

_____

ALVIN J. LISKA